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Hong Leong Bank Bhd v Tan Siew Nam & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02–2059 OF 2011
ABDUL MALIK ISHAK, ABDUL WAHAB PATAIL AND AZIAH ALI JJCA
24 APRIL 2014

Contract — Frustration — Impossibility — Respondents obtained loan from bank to buy property from developer — Respondents' rights, title and interest under sale and purchase agreement ('SPA') with developer assigned absolutely to bank — Respondents consented to developer charging master title to land to third party — Whether order for sale of land obtained by third party upon developer's default frustrated and rendered void respondents' loan agreement with bank and SPA with developer — Whether frustration, if any, was self induced — Whether s 66 of the Contracts Act 1950 must be read together with s 15 of the Civil Law Act 1956 when considering consequence of contracts rendered void for frustration

The respondents obtained a loan from the appellant to part-finance their purchase of a shop lot from a developer. They paid RM151,900, being the difference between the purchase price and the loan sum, direct to the developer and then signed a loan agreement cum deed of assignment ('the LACA') absolutely assigning to the appellant all their rights, title and interest in the property under their sale and purchase agreement ('the SPA') with the developer as security for the loan. At that time, the appellant was given to understand by its lawyers that the master title to the land on which the shop lot stood ('the land') had yet to be issued. Unknown to the appellant and the respondents, the master title had been issued and the developer had charged the same to a bank ('PBB') in return for a loan. PBB obtained an order for sale of the land following the developer's default in servicing the loan. When it knew about the foreclosure proceedings, the appellant sought to intervene to obtain an order excluding the property from the order for sale. The High Court did not make a decision on the intervener application but ordered the liquidators of the developer to do the needful to sell the entire development scheme to new buyers and use the proceeds therefrom to pay off PBB's debt and secure the release of the respondents' property. The order for sale was therefore kept in abeyance pending the fulfilment of the directions given. Meanwhile, the appellant terminated its loan agreement with the respondents following their default and sued the respondents in the High Court for recovery of all monies due. In response, the respondents counterclaimed for the RM151,900 they had paid directly to the developer and for all monies they had paid to the appellant in repayment of the loan. The High Court dismissed the appellant's claim and allowed the counterclaim holding that because the order for sale obtained by

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PBB caused the loss of the property as security and made it unable for the appellant to reassign the property back to the respondents, the LACA was rendered frustrated and void. Flowing from that finding, the High Court held that pursuant to s 66 of the Contracts Act 1950, the appellants were bound to pay to the respondents the RM151,900 they had paid to the developer and to refund all monies the respondents had paid to the appellant under the loan. In the instant appeal from that decision to the Court of Appeal, the appellant argued that the LACA was neither frustrated nor void; that under cl 5.34 of the SPA the respondents expressly gave their consent to the developer to charge the master title to the land subject to the condition the developer was at all times not released from its obligation to transfer the shop lot to the respondents free of encumbrances.

Held, allowing the appeal and claim with costs RM50,000:

(1) Both the SPA and the LACA were not frustrated. By cl 5.34 of the SPA, the respondents had consented to the developer charging the master title in favour of PBB. If the developer failed to exclude the property from the charge and was unable to transfer the same to the respondents free of encumbrances, the respondents had a claim against the developer for breach of contract. There was therefore no basis to argue that the SPA had been frustrated. The respondents could not rely on self-induced frustration to avoid the contract (see paras 26–28 & 39).

(2) The LACA was not frustrated and it stood independently from the SPA. The performance of the obligations under the LACA did not become impossible even if it was argued that the SPA between the developer and the respondents had become frustrated. The LACA was a loan agreement. The root of the transaction was not the property itself which merely served as security for repayment of the loan. When the respondents gave their consent to the developer to charge the master title to PBB, the risk that PBB might foreclose on the land and the property was a risk the respondents were willing to shoulder. That risk did not pass to the appellant under the LACA as it was not a sale agreement for the property. Even if the property was lost or destroyed, such an eventuality could not frustrate the LACA (see paras 52–53 & 56–57).

(3) The High Court erred in holding that the LACA had been frustrated because it was impossible for the appellant to perform its obligation to reassign the property pursuant to cl 37 of the LACA. The assignment merely transferred the chose in action to the bank. Once the loan was fully repaid, that chose in action was capable of being transferred or assigned back to the borrower. Equating the chose in action with the physical property was a grave error. In reality, what was assigned was the respondents' rights, title and interest under the SPA (see paras 67 & 72–73).

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(4) It was premature of the High Court to have concluded that the property was lost in view of the order for sale. Although the order for sale might have subsisted, the directions that were given by the court showed that the order was kept in abeyance pending the sale of the entire development by the developer's liquidator to a third party the proceeds of which were to be used to pay off PBB's debt and secure the release of the respondents' property and if those conditions were not met then the respondents' application to intervene and set aside the order for sale would be reinstated and fixed for hearing (see paras 76–77).

(5) The High Court erred in applying s 66 of the Contracts Act 1950 in isolation without reading it together with s 15 of the Civil Law Act 1956. Whilst the High Court found that the LACA had been frustrated, there was no finding that the SPA had also been frustrated. There was no basis whatsoever to order the appellant to pay the respondents the RM151,900 which the latter had paid directly to the developer under the SPA which was a separate contract. Even if there was a finding that the SPA was frustrated, under s 15(2) of the Civil Law Act 1956 it was the developer and not the appellant that was liable to refund the sum. Since the said sum was not paid to the appellant under the LACA, the respondents were not entitled to recover that sum under s 15(2) (see paras 80–82 & 86).

[Bahasa Malaysia summary

Responden-responden telah memperolehi pinjaman daripada perayu untuk separa-membiayai pembelian lot kedai daripada pemaju. Mereka membayar RM151,900, iaitu perbezaan antara harga belian dengan jumlah pinjaman, terus kepada pemaju dan kemudian menandatangani satu perjanjian pinjaman merangkap surat ikatan penyerahhakan ('LACA') untuk menyerahkan sepenuhnya kepada perayu kesemua hak-hak, hak milik dan kepentingan dalam hartanah di bawah perjanjian jual beli ('PJB') dengan pemaju sebagai cagaran untuk pinjaman tersebut. Ketika itu, perayu diberikan penerangan oleh peguam-peguamnya bahawa hak milik induk ke atas tanah di mana lot kedai tersebut didirikan belum lagi dikeluarkan. Tanpa pengetahuan perayu dan responden-responden, hak milik induk telah dikeluarkan dan pemaju telah memajakkannya kepada bank ('PBB') sebagai balasan bagi pinjaman. PBB memperolehi satu perintah jualan bagi tanah tersebut berikutan kegagalan pemaju membayar pinjaman. Apabila ia mengetahui mengenai prosiding penyitaan, perayu memohon untuk mencelah untuk mendapatkan perintah mengeluarkan hartanah daripada perintah jualan. Mahkamah Tinggi tidak membuat keputusan mengenai permohonan pencelahan tetapi memerintahkan pelikuidasi-pelikuidasi pemaju untuk membuat apa yang perlu untuk menjual keseluruhan skim pembangunan kepada pembeli-pembeli baharu dan menggunakan hasilnya untuk membayar hutang PBB dan mendapatkan pelepasan hartanah responden-responden. Perintah untuk jualan dengan itu terbiar sementara menunggu pemenuhan bagi

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perintah-perintah yang diberikan. Sementara itu, perayu menamatkan perjanjian pinjaman dengan responden-responden berikutan kegagalan mereka dan menyaman responden-responden di Mahkamah Tinggi bagi mendapatkan semua wang yang terhutang. Sebagai balasan, responden-responden menuntut balas bagi RM151,900 yang telah mereka bayar secara terus kepada pemaju dan bagi kesemua wang yang telah mereka bayar kepada perayu sebagai pembayaran semula pinjaman tersebut. Mahkamah Tinggi menolak tuntutan perayu dan membenarkan tuntutan balas, memutuskan bahawa oleh kerana perintah jualan yang diperolehi oleh PBB telah menyebabkan kehilangan hartanah sebagai cagaran dan menjadikan ia tidak boleh untuk perayu menyerahhakan semula hartanah tersebut kepada responden-responden, LACA dikatakan telah dikecewakan dan batal. Berikutan itu, Mahkamah Tinggi memutuskan bahawa di bawah s 66 Akta Kontrak 1950, perayu-perayu terikat untuk membayar kepada responden-responden RM151,900 yang telah mereka bayar kepada pemaju dan memulang semula kesemua wang yang telah responden-responden bayar kepada perayu di bawah perjanjian. Dalam rayuan kepada Mahkamah Rayuan, terhadap keputusan tersebut, perayu menghujahkan bahawa LACA tidak dikecewakan mahupun batal; bahawa di bawah klausa 5.34 PJB, responden-responden telah memberikan kebenaran mereka secara nyata kepada pemaju untuk memajakkan hak milik induk tanah tersebut tertakluk kepada syarat bahawa pemaju pada setiap masa dilepaskan daripada kewajipan untuk memindahkan lot kedai tersebut kepada responden-responden bebas daripada bebanan.

Diputuskan, membenarkan rayuan dan tuntutan dengan kos sebanyak RM50,000:

(1) Kedua-dua PJB dan LACA tidak dikecewakan. Di bawah klausa 5.34 PJB, responden-responden telah membenarkan pemaju memajakkan hak milik induk untuk PBB. Sekiranya pemaju gagal untuk mengeluarkan hartanah tersebut daripada pajakan dan tidak boleh memindah miliknya kepada responden-responden bebas daripada halangan-halangan, responden-responden mempunyai tuntutan terhadap pemaju bagi pelanggaran kontrak. Oleh itu, tiada asas untuk menghujahkan bahawa PJB telah dikecewakan. Responden-responden tidak boleh bergantung pada kekecewaan yang didorongi diri sendiri untuk mengelakkan kontrak (lihat perenggan 26–28 & 39).

(2) LACA tidak dikecewakan dan ia berdiri secara berasingan daripada PJB. Pelaksanaan kewajipan di bawah LACA tidak menjadi mustahil jika pun dihujahkan bahawa PJB antara pemaju dan responden-responden telah dikecewakan. LACA adalah perjanjian pinjaman. Asas transaksi tersebut bukanlah hartanah itu sendiri yang hanya bertindak sebagai pajakan bagi pembayaran semula pinjaman. Apabila responden-responden memberikan kebenaran kepada pemaju untuk memajakkan hak milik

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induk kepada PBB, risiko bahawa PBB akan menyita tanah dan hartanah tersebut adalah risiko yang responden-responden sanggup pikul. Risiko tersebut tidak diberikan kepada perayu di bawah LACA kerana ia bukanlah perjanjian jualan bagi hartanah. Jika pun hartanah tersebut hilang atau rosak, kemungkinan tersebut tidak boleh mengecewakan LACA (lihat perenggan 52–53 & 56–57).

(3) Mahkamah Tinggi khilaf dalam memutuskan bahawa LACA telah dikecewakan kerana adalah tidak mungkin bagi perayu untuk melaksanakan kewajipannya untuk menyerahhakkan semula hartanah tersebut di bawah klausa 37 LACA. Penyerahhakan tersebut sekadar memindah milik hak dalam tindakan kepada bank. Apabila pinjaman telah dibayar sepenuhnya, hak dalam tindakan tersebut boleh dipindahkan atau diserahhakkan semula kepada peminjam. Menyamakan hak dalam tindakan dengan hartanah fizikal adalah kesilapan besar. Secara realitinya, apa yang diserahhakkan adalah hak-hak, hak-hak milik dan kepentingan responden-responden di bawah PJB (lihat perenggan 67 & 72–73).

(4) Adalah pra-matang untuk Mahkamah Tinggi menyimpulkan bahawa hartanah tersebut telah hilang akibat perintah jualan. Walaupun perintah jualan mungkin telah diwujudkan, arahan-arahan yang telah diberikan oleh mahkamah menunjukkan bahawa perintah tersebut terbiar sambil menunggu keseluruhan pembangunan oleh pelikuidasi kepada pihak ketiga yang mana hasilnya digunakan untuk membayar hutang PBB dan mendapatkan pelepasan hartanah responden dan sekiranya syarat-syarat tersebut tidak dipenuhi, permohonan responden-responden untuk mencelah dan mengenepikan perintah jualan akan dimasukkan semula dan ditetapkan untuk perbicaraan (lihat perenggan 76–77).

(5) Mahkamah Tinggi khilaf dalam mengguna pakai s 66A Akta Kontrak 1950 secara berasingan tanpa membaca bersama-sama dengan s 15 Akta Undang-Undang Sivil 1956. Walaupun Mahkamah Tinggi memutuskan bahawa LACA telah dikecewakan, tiada dapatan bahawa PJB telah dikecewakan. Tiada asas apa pun untuk mengarahkan perayu untuk membayar responden-responden RM151,900 yang mana dia telah membayar secara terus kepada pemaju di bawah PJB yang merupakan satu kontrak berasingan. Jika pun terdapat dapatan bahawa PJB telah dikecewakan, di bawah s 15(2) Akta Undang-Undang Sivil 1956, adalah pemaju dan bukan perayu yang bertanggungan untuk memulangkan jumlah tersebut. Oleh kerana jumlah tersebut tidak dibayar kepada perayu di bawah LACA, responden-responden tidak berhak untuk mendapatkan semula jumlah tersebut di bawah s 15(2) (lihat perenggan 80–82 & 86).]

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Notes

For cases on impossibility, see 30(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 4810–4819.

Cases referred to

Amal Bakti Sdn Bhd & Ors v Affin Merchant Bank (M) Bhd [2012] 5 MLJ 61; [2012] 4 CLJ 813, CA (refd)

Amalgamated Investment and Property Co Ltd v John Walker & Sons Ltd [1977] 1 WLR 164, CA (folld)

Arab Malaysian Bank Bhd v Strategi Cerah Sdn Bhd & Ors [2006] 6 MLJ 339; [2006] 3 CLJ 742, HC (not folld)

Bank Line Ltd v Arthur Capel & Co [1919] AC 435, HL (refd)

Cheok Hock Beng & Ors v Lim Thian Siong & Anor [1992] 2 CLJ 1100, HC (refd)

Chong Wan Kum v Wan Choong [1983] 1 CLJ 193, HC (refd)

Chuah Eng Khong v Malayan Banking Bhd [1998] 3 MLJ 97; [1999] 2 CLJ 917, FC (consd)

Dato Yap Peng & Ors v Public Bank Bhd & Ors [1997] 3 MLJ 484, CA (refd)

Davis Contractors Ltd v Fareham UDC [1956] AC 696, HL (refd)

HA Berney v Tronoh Mines Limited [1949] 1 MLJ 4 (refd)

Ho Weng Leong v Ng Kee Chin [1996] 5 MLJ 139, HC (refd)

Hong Leong Bank Bhd v Goh Sin Khai [2005] 3 MLJ 154; [2005] 3 CLJ 24, HC (refd)

Hong Leong Bank Bhd (which has taken over all assets and liabilities of Hong Leong Finance Bhd) v Sum-Projects (Bros) Sdn Bhd [2010] 7 MLJ 39; [2010] 7 CLJ 1010, HC (refd)

Khoo Than Sui v Chan Chiau Hee [1976] 1 MLJ 25 (refd)

Lauritzen (J) AS v Wijsmuller BV, The Super Servant Two [1990] 1 Lloyd's Rep 1, CA (refd)

Lim Kim Som v Sheriffa Taibah bte Abdul Rahman [1994] 1 SLR 393, CA (refd)

Lin Wen-Chih & Anor v Pacific Forest Industries Sdn Bhd (formerly known as Veramax Sdn Bhd) & Anor [2008] 6 MLJ 89; [2008] 5 CLJ 29, CA (refd)

Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77; [1997] 2 CLJ 36, SC (folld)

Malayan Banking Bhd v Tonyin Fast Foods Sdn Bhd and Others [2010] MLJU 564, HC (refd)

Maritime National Fish Ltd v Ocean Trawlers Ltd [1935] AC 524, PC (refd)

National Carriers Ltd v Panalpina (Northern) Ltd [1981] AC 675, HL (refd)

Ocean Tramp Tankers Corpn v V/O Sovfracht, The Eugenia [1964] 2 QB 226, CA (refd)

Ooi Yoke In & Anor v Public Finance Bhd [1992] MLJU 25 ; [1993] 1 AMR 734, HC (refd)

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Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd [2012] 4 MLJ 149, CA (refd)
Phileoallied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor [2002] 2 MLJ 513; [2002] 2 CLJ 621, FC (refd)
Ramli bin Zakaria & Ors v Government of Malaysia [1982] 2 MLJ 257, FC (refd)
Satyabrata Ghose v Messrs Mugneeram Bangur & Co and another AIR 1954 SC 44, SC (refd)
Standard Chartered Bank v Kuala Lumpur Landmark Sdn Bhd [1991] 2 MLJ 251, HC (refd)
Syarikat Angkasa Bumiputra v Sabah Land Development Board [1987] 1 CLJ 90, HC (refd)
Tan Hiow v Lee Boon Chia [1958] 3 MC 173 (refd)
Taylor and Another v Caldwell and Another (1863) 3 B & S 826, KB (refd)
Uni-Ocean Lines Pte Ltd v C-Trade SA, The Lucille [1984] 1 Lloyd's Rep 244, CA (refd)
Wilson (Paal) & Co A/S v Partenreederei Hannah Blumenthal, The Hannah Blumenthal [1983] 1 AC 854, HL (refd)
Yoong Sze Fatt v Pengkalen Securities Sdn Bhd [2011] 4 MLJ 805, CA (refd)

Legislation referred to

Civil Law Act 1956 ss 15, 15(1), (2), (3), (4), (5), (6)
Contracts Act 1950 ss 57, 57(2), 66
Indian Contract Act 1872 [IND] s 56
National Land Code

Appeal from: Civil Suit No MT22–241 of 2008 (High Court, Johor Bahru)

Clarence Edwin (R Paramanandan with him) (Clarence Edwin Law Offices) for the appellant.
Ng Chew Hor (Yeo Chun Ming with him) (CM Yeo & Associates) for the respondents.

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] This was an appeal by the appellant against the decision of the High Court at Johor Bahru after a full trial. The learned High Court judge dismissed the appellant's claim and allowed the respondents' counterclaim.

[2] This appeal concerned specific findings made by the learned High Court judge. This court will not readily intervene with the findings of fact arrived at by the trial court unless there is a fundamental misdirection that

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warrants appellate intervention. The law reports are replete with authorities setting out instances where appellate intervention was exercised. Abdul Malik bin Ishak JCA writing a separate judgment in *Yoong Sze Fatt v Pengkalen Securities Sdn Bhd* [2011] 4 MLJ 805 (CA) had this to say on this subject at pp 824–825 of the report:

> It would be ideal to set out, briefly, instances where the finding of facts by the trial court was reversed by the appellate court:
>
> (a) non-consideration or insufficient or no judicial appreciation of material evidence constitutes 'insufficient judicial appreciation of relevant evidence' (*Asean Security Paper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 MLJ 301; [2007] 2 CLJ 1 (FC));
>
> (b) where the audio visual advantage reserved to a trial judge had been missed or that the findings made by the trial judge do not accord well with the probabilities of the case (*Len Min Kong v United Malayan Banking Corp Bhd and another appeal* [1998] 2 MLJ 478 at pp 486 C—D; [1998] 2 CLJ 879; [1998] 3 AMR 2641 at p 2655 (CA); *Maju Holdings Sdn Bhd v Fortune Wealth (H-K) Ltd and other appeals* [2004] 4 MLJ 105; [2004] 4 CLJ 282; [2004] 6 AMR 319 (CA); and *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309; [2004] 6 AMR 781 (FC));
>
> (c) where the facts were misapprehended and the wrong principles of law were blindly applied by the trial judge (*Lim Chor Ching & Anor v Idris Abdul Karim (and Anor Appeal)* [1998] 3 CLJ Supp 145; [1998] 3 AMR 3182 at p 156 a—g);
>
> (d) where there was a failure to assess the evidence with the documents at hand and view it against the probabilities of the case (*Loo Hon Kong v Loo Kim Lim @ Loo Kim Leong* [2004] 4 CLJ 1; [2004] 4 AMR 591, (CA));
>
> (e) where there was a failure to consider the relevancy of contemporaneous documents (*Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor* [1989] 1 MLJ 35 SC at p 37); and
>
> (f) where the finding of facts was contrary to the documentary evidence (*Associated Tractors Sdn Bhd v Woo Sai Wa* [1997] 5 MLJ 441, at p 451 C).

[3] Abdul Wahab Patail JCA writing for this court lucidly sets out the law governing appellate intervention in *Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd* [2012] 4 MLJ 149, at p 154, in this way:

> (7) There is almost no limit to the range within which cases in court may vary. At one end there are cases that involve solely questions of law, and no facts are disputed. On the other there are cases that involve no law but all the facts are disputed. Within these cases there may be cases with disputed facts that involve solely interpretation and inferences leading to a conclusion on a finding on the disputed fact, and there may be other cases with disputed facts that involve solely oral evidence and the finding depends entirely upon an assessment of the credibility of witnesses who testified and were tested before the trial judge.

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(8) Hence, the proper approach is that if (a) it is shown that the judgment cannot be explained or justified by the special advantage enjoyed by the trial judge by reason of having seen and heard the witnesses testify and being tested before him, and (b) an injustice is demonstrated to have been occasioned by any error by the trial judge, for example:

(a) the judgment is based upon a wrong premise of fact or of law;

(b) there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him;

(c) the trial judge has completely overlooked the inherent probabilities of the case;

(d) that the course or events affirmed by the trial judge could not have occurred;

(e) the trial judge had made an unwarranted deduction based on faulty judicial reasoning from admitted or established facts; or

(f) the trial judge had so fundamentally misdirected himself that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion;

an appellate court will intervene to rectify that error so that injustice is not occasioned.

[4] Anantham Kasinather JCA in *Amal Bakti Sdn Bhd & Ors v Affin Merchant Bank (M) Bhd* [2012] 5 MLJ 61 at p 84; [2012] 4 CLJ 813 at p 841, spoke of appellate interference in this context:

An appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. Additionally, appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence.

[5] We applied these authorities in considering the current appeal at hand.

[6] Now, before us, learned counsel for the appellant argued that the learned High Court judge was plainly wrong in arriving at her decision and that there was insufficient judicial appreciation of the evidence adduced during the trial. While learned counsel for the respondents submitted to the contrary and he argued that the learned High Court judge was right and that the appellant's appeal should be dismissed with costs.

THE FACTS OF THE CASE

[7] Before we proceed any further, we will now narrate the facts based on the evidence tendered before the learned High Court judge.

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[8] By way of a sale and purchase agreement dated 8 September 1996 ('the SPA'), the respondents agreed to purchase from the vendor, Transbay Ventures Sdn Bhd ('the developer'), a shoplot ('the property') in an area dubbed as the JB Waterfront City. The purchase price was listed at RM601,900.

[9] The respondents applied for a loan from the appellant. And by way of a letter of offer dated 26 December 1996 as seen at pp 116–122 of the appeal record at *Jilid* 2, the appellant offered the respondents an overdraft of RM 180,000 and a term loan of RM270,000 to part finance the purchase of the property. A supplementary letter of offer dated 10 January 2001 as seen at pp 123–124 of the appeal record at *Jilid* 2 showed that the appellant agreed to the respondents' request to convert the overdraft facility into a term loan. The respondents paid directly to the developer the difference between the purchase price and the loan sum.

[10] The parties executed a loan agreement cum deed of assignment dated 3 February 1997 ('the LACA') as seen at pp 125–161 of the appeal record at *Jilid* 2, whereupon the property and the full and entire benefit of the SPA together with all rights, title and interest of the respondents were assigned to the appellant, free from any encumbrances, as security. By letter dated 28 February 1997 (exh P4) as seen at pp 162–163 of the appeal record at *Jilid* 2, the appellant's solicitors confirmed that the LACA had been duly stamped and registered in the High Court. It was also stated in the same letter that the respondents had paid the difference between the balance of the purchase price and the loan sum to the developer. In the same letter, the appellant's solicitors also informed the appellant that the Johor Bahru land office had confirmed that the master title to the JB Waterfront City had yet to be issued and that a search on the title would be conducted upon issuance of the master title. Finally, in the same letter, the appellant's solicitors also advised that the loan would be released progressively to the developer in accordance with the architect's certificates. The appellant's witness, by the name of Ms Loo Sok Cheng, in her witness statement at p 67 of the appeal record at *Jilid* 1, responded to the question that was posed to her in this way:

> Q8.1: Did the plaintiff (appellant) enter any caveat on the land?
>
> A: At the time of disbursing the loan, the plaintiff (appellant) did not enter any caveat on the land as we were informed by Messrs. Tay & Associates, solicitors handling the loan agreement, that the master title has yet to be issued by the Land Office. There was no land title as this JB Waterfront City project was built on stilts along the Johor Straits.

[11] By letter dated 19 March 1997 (exh P5) as seen at p 164 of the appeal record at *Jilid* 2, the developer gave the appellant several undertakings in consideration of the disbursement of the loan and that would include the undertaking to deliver to the appellant the strata title for the property free from

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encumbrances upon its issuance together with a valid memorandum of transfer in favour of the respondents. The developer's undertakings to the appellant in exh P5 were worded in this way:

> In consideration of your agreeing to release the aforesaid loan sum to us progressively against the Architect's Certificate in accordance with the Schedule of Payment in the Sale and Purchase Agreement, we hereby undertake as follows:
>
> (1) deliver to you the strata title for the said property free from encumbrances upon its issuance together with a valid but unstamped Memorandum of Transfer in favour of the purchaser(s) abovenamed; and
>
> (2) we undertake to refund to the Financier all monies released to us free from interest under the said Loan in the event that the transfer and/or charge in favour of the Financier is rejected for registration by the relevant land authority for any reason whatsoever;
>
> (3) to forward (to) you the Letter of Consent to transfer the property to the abovenamed purchaser(s) and Letter of Consent to charge the property to you issued by the relevant authorities upon issuance of the strata title.

[12] Since all the security documents pertaining to the property were in order, the appellant proceeded to disburse the loan progressively on the strength of the architect's certificates.

[13] Unknown to both the appellant and the respondents, the master title to the JB Waterfront City was issued by the Johor Bahru Land Office bearing title number vide HS(D) 256676 PTB 20214 Bandar Johor Bahru, Negeri Johor. But the developer who knew about the issuance of the master title, charged the said master title to Public Bank Bhd by way of a charge Presentation No 32284/98.

[14] The developer defaulted in servicing the loan to Public Bank Bhd. The latter instituted foreclosure proceedings against the developer. On 7 October 2003, Public Bank Bhd, the chargee of the master title to the whole of Lot 1 complex at the JB Waterfront City, pursuant to the charge dated 26 June 1998, obtained an order for sale in respect of all the units of Lot 1 complex at the JB Waterfront City including the property in question.

[15] Justice Kang Hwee Gee (as he then was) sitting in the High Court at Johor Bahru gave the order for sale dated 7 October 2003 as seen at pp 270–277 of the appeal record at *Jilid* 3. The order for sale was worded, inter alia, in this way (see pp 271–272 of the appeal record at *Jilid* 3):

> ... ADALAH DIPERINTAHKAN bahawa:
>
> (1) tanah yang dipegang di bawah HS(D) 256676, PTB 20214, Bandar Johor Bahru, Negeri Johor Darul Takzim (kecuali unit-unit yang telah ditebus balik, butir-butirnya adalah seperti dalam Lampiran A yang dikembarkan

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bersama dengan Saman Pemula tersebut dan unit-unit lain yang akan ditebus balik atau dikecualikan pada masa akan datang) (selepas ini dikenali sebagai 'Hartanah tersebut') yang telah digadaikan kepada plaintif oleh defendan melalui Gadaian tersebut dijualkan melalui lelongan awam di bawah Kanun Tanah Negara untuk menjelaskan jumlah terhutang seperti berikut:

(i) pembayaran jumlah terhutang dan kena dibayar sebanyak RM16,352,199.69 setakat 7.10.2003 beserta dengan faedah berterusan ke atas RM16,352,199.69 pada kadar 2.5% setahun ke atas Kadar Pinjaman Dasar plaintif pada rehatan bulanan (selepas ini dikenali sebagai 'Kadar Priskrip') dan faedah tambahan pada kadar 1.0% setahun ke atas Kadar Priskrip dari 8.10.2003 sehingga tarikh pembayaran penuh, di bawah Kemudahan BL tersebut yang telah diberikan oleh plaintif kepada defendan.

[16] The appellant only knew about the foreclosure proceedings and the charge of the master title in favour of Public Bank Berhad from an advertisement in the newspaper. In this context, the witness statement of Ms Loo Sok Cheng at pp 66–67 of the appeal record at *Jilid* 1 revealed the current state of affairs. For convenience, it will now be reproduced:

8.Q8: Can tell the Court of the foreclosure action by Public Bank against Transbay Ventures Sdn Bhd (the developer)?

A: We only got to know about the competing interest by Public Bank vide the Public Bank's foreclosure proceedings against Transbay Ventures Sdn Bhd (the developer) sometime in 2004 from a newspaper advertisement.

We were made to understand that Transbay had charged the whole of the JB Waterfront City to Public Bank after they had sold and assigned the units to the individual purchasers. This can be seen as the Registration of Charge vide 32284/1998 Jilid 4296, Folio 31 dated 26.6.1998. As can be recalled, the SPA between the Developer and the defendants has been executed on 8.9.1996. The plaintiff had offered the loan to the defendants via Letter of Offer dated 26.12.1996. The loan was disbursed on 7.5.1997. From what we know, the developer had defaulted on their loan with Public Bank and hence the foreclosure taken by Public Bank against the developer.

[17] The appellant sought to intervene in the foreclosure proceedings and to obtain an order to exclude the property from any order for sale that Public Bank Bhd may obtain in regard to the charge. In this context, reference must be made to the witness statement of Ms Loo Sok Cheng at p 67 of the appeal record at *Jilid* 1 and it reads as follows:

9.Q9: What steps did the plaintiff (appellant) take once they know of the Public Bank's foreclosure proceedings?

A: We immediately appointed our solicitors to intervene and sought to exclude the plaintiff's (appellant's) units from the sale.

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[18] The appellant's application to intervene was heard by Justice Kang Hwee Gee (as he then was) at the High Court. But His Lordship did not make any ruling on the matter. The witness statement of Ms Loo Sok Cheng at pp 68–70 of the appeal record at *Jilid* 1 alluded to the status quo of the appellant's application to intervene at some length and we will now reproduce them:

> 10.Q10: What is the status of the application?
>
> A: The application to intervene was heard by the learned Judge, Justice Kang Hwee Gee at the Kuala Lumpur High Court. However, the learned Judge did not make any ruling concerning the exclusion of the units from the Order for Sale. His Lordship had directed that the Public Bank be allowed to proceed to sell the undisputed units leaving out the disputed units by other previous purchasers. I refer to page 22 of the plaintiff's Additional Bundle of Document, the letter dated 17.10.2008 from Arun & Co., the plaintiff's lawyers in the Public Bank's foreclosure proceedings, stating that sale exercise must exclude the plaintiff's units (see the letter dated 17.10.2008 marked as P-6).
>
> We have obtained from the solicitors for Public Bank, Messrs. Benjamin Dawson, a copy of the minutes of the proceedings wherein the learned Judge made the directions (see pages 23 to 26 of the plaintiff's Additional Bundle of Document. Pray to mark as ID-7). Messrs. Benjamin Dawson had also confirmed that the Memorandum of Sale did not include the disputed units (see pages 5 to 21 of the plaintiff's Additional Bundle of Document, letter dated 2.2.2007 (attaching the Memorandum of Sale) by Messrs. Benjamin Dawson. Pray to mark as ID-8) together with a letter dated 2.2.2007 from Arun & Co forwarding such letter to plaintiff (Pray to mark as P-9).
>
> We have also confirmed with the solicitors for liquidator of the Developer, Messrs. Lee Hishammuddin Allen Gledhill, that the tender exercise for the sale by the liquidator has excluded the defendants' unit, 2F-68 (please see page 27(b), Letter from Messrs. Lee Hishammuddin dated 20.5.2011. Pray to be marked as ID-10) and plaintiff's solicitor's letter requesting the confirmation of exclusion of the said unit from the Liquidator's solicitors at page 27(a) in the same bundle (Pray to be marked as P-11).
>
> Q.10.1: Does that mean the defendants' unit would not be sold?
>
> A: We were made to understand from the Liquidator's solicitor, Messrs. Lee Hishammuddin Allen Gledhill, that (they) are in the midst of selling the undisputed units. We have also been informed by the Liquidator's solicitor, if there is a surplus from the sale of the units, Public Bank Berhad will discharge the remaining units.
>
> Q10.2: Does that mean that the security property is not lost?
>
> A: From what had transpired, we were advised that the security property was not lost as both the Public Bank and the liquidator had confirmed that the sale tender exercise has excluded the defendants' unit. What remained to be done was the finalisation of the sale of the undisputed units to a new investor or purchaser and the sale proceeds will be used to redeem the Public Bank's charge.

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[19] In the mean time, the respondents defaulted on the loan that was extended by the appellant. By letter dated 10 September 2007 as seen at pp 192–193 of the appeal record at *Jilid* 2, the appellant issued a notice of demand (exh P14) to both the respondents demanding for the arrears on the sum. The notice of demand in exh P14 was worded in this way:

> Notice Of Demand For The Arrears of RM95,587.10 as at 06.07.2007
>
> Facilities: 1)Term Loan I of RM270,000.00 (A/c No: 14400007565)
>
> 2)Term Loan II of RM180,000.00 (A/c No: 14400015672)
>
> Borrowers:Tan Siew Nam & Sheiry Wee Cheng Neo
>
> The Bank :EON Bank Berhad
>
> ---
>
> We act for EON Bank Berhad (Co. No. 92351-V) of Credit Recovery Centre, No. 35, 37 & 39, 1st Floor, Jalan Johar 1, Taman Desa Cemerlang, 81800 Ulu Tiram, Johor.
>
> We are instructed by our client that you were offered a Term Loan I facility and a Term Loan II facility by our client (hereinafter referred to as 'the said facilities'). We are further that you had accepted the said offer and that said facilities had been disbursed.
>
> We are instructed by our client that you have, in breach of the terms and conditions upon which the said facilities was extended to you, failed to pay to our client the arrears of RM95,587.10 as at 06.07.2007, particulars are as follows:
>
> *Term Loan I of RM270,000.00 (A/c No: 14400007565)*
>
> Instalment Amount: RM59,689.50 (from part of Dec'05 to July'07)
>
> Late Charges : RM243.99
>
> Misc. Charges : RM733.65
>
> Total Due *RM60,667.14*
>
> *Term Loan II of RM180,000.00 (A/c No: 14400015672)*
>
> Instalment Amount: RM34,579.96 (from Dec'05 to July'07)
>
> Late Charges : RM340.00
>
> Misc. Charges : RM00.00
>
> Total Due RM34,919.96
>
> Total Amount Outstanding *RM95,587.10*
>
> Interest continues to accrue on the total sum from 07.07.2007 until the date of full settlement.
>
> Despite our client's repeated reminders, you have to date failed refused and or neglected to settle the said sum of RM95,587.10 or any part thereof.
>
> We have therefore been instructed by our client to demand from you, which we hereby do, the said sum of RM95,587.10 together with further interest thereon.
>
> TAKE NOTICE that unless the said sum of RM95,587.10 together with further interest thereon is paid to our client or to us as solicitors for our client within *seven*

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(7) days from the date hereof, the said facilities will be deemed automatically terminated and recalled by our client on account of your breach without further reference in which event the total amount outstanding under the said facilities will become due and payable.

TAKE FURTHER NOTICE that in the event of the termination and recall of the said facilities as aforesaid, we have strict instructions to institute legal proceedings against you for the recovery of the total amount outstanding under the said facilities in which case you will be held additionally liable for all costs incurred thereby.

TAKE NOTICE ALSO that any payment made by you to our client in respect of the amount demanded herein, be it payment in part or in full, shall be accepted by our client without prejudice to our client's right to proceed with legal action against you.

Please also note that you are liable to pay the sum of RM21.00 being the cost of issuing this notice.

[20] But the respondents failed to comply with the notice of demand. This prompted the appellant to issue a notice dated 17 September 2007 (exh P15) to terminate and recall the loan. That notice in exh P15 can be seen at pp 194–195 of the appeal record at *Jilid* 2, and it was worded in this way:

Notice Of Recall Of Banking Facility

Facilities:

1) Term Loan I of RM270,000.00 (A/c No: 14400007565)

2) Term Loan II of RM180,000.00 (A/c No: 14400015672)

Borrowers: Tan Siew Nam & Sheiry Wee Cheng Neo

The Bank : EON Bank Berhad

We act for EON Bank Berhad (Co. No. 92351-V) of Credit Recovery Centre, No. 35, 37 & 39, 1st Floor, Jalan Johar 1, Taman Desa Cemerlang, 81800 Ulu Tiram, Johor.

Our client instructs us that despite our Notice of Demand dated 10.07.2007, you have to date failed refused and/or neglected to settle the amount in arrears under the abovementioned banking facility.

We have therefore been instructed by our client to notify you, which we hereby do, that the above mentioned banking facilities are recalled by our client forthwith and the said facility now stand terminated.

We are further instructed by our client that the total amount outstanding under the above mentioned banking facilities are now due and payable to our client, such amount being RM368,785.11 (RM186,562.04 for Term Loan I and RM182,223.07 for Term Loan II) both calculated as at 12.09.2007 computed as follows:

Term Loan I of RM270,000.00 (A/c No: 14400007565)

Outstanding Balance: RM186,562.04

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Interest rate

chargeable : 3.5% per annum above BLR on monthly rest

Term Loan II of RM180,000.00 (A/c No: 14400015672)

Outstanding Balance: RM182,223.07

Interest chargeable : 3.5% per annum above BLR on monthly rest

The total amount outstanding under the said banking facilities as at 12.09.2007 is therefore RM368,785.11.

We have therefore been instructed by our client to demand from you, which we hereby do, the said sum of RM368,785.11 together with further interest thereon at the prescribed rates of interest from 13.09.2007 until the date of full settlement.

TAKE NOTICE that unless the sum of RM368,785.11 together with further interest accruing thereon at the prescribed rates is paid to our client or to us as solicitors for our client within *fourteen (14) days* from the date hereof, we have firm instructions from our client to institute legal proceedings against you including but not limited to foreclosure proceedings on the charged property for the recovery of the same without further reference in which event you may be additionally liable for all costs incurred thereby.

TAKE FURTHER NOTICE that any payment towards the amount demanded herein, be it payment in part or in full, will be accepted by our client without prejudice to our client's right to proceed with legal action against you.

Please note that you are liable to pay the sum of RM21.00 being the cost of issuing this notice.

[21] By letter dated 25 September 2007 (exh P12) as seen at p 190 the appeal record at *Jilid* 2, the respondents wrote to the appellant and sought to reschedule payments due to financial difficulties. The appellant acceded to the respondents' request and issued a letter dated 7 November 2007 (exh P13) as seen at p 191 of the appeal record at *Jilid* 2 allowing the respondents to pay the monthly instalment at a lower rate. That letter in exh P13 was worded in this way:

RE: Term Loan (I) of RM270,000.00 (A/c No: 14400007565)

Term Loan (II) of RM180,000.00 (A/c No: 14400015672)

A unit of shopping lot at Waterfront City Shopping Mall known as Lot No. 2F-68, JB Waterfront City held under Master Title HS(D) 256676 PTB 20214 Township and District of JB, Johor.

We refer to the above and to your request letter dated 25.09.2007.

Please be informed that our Management has agreed to accept your request for the repayment proposal of the above Term Loan (I) & Term Loan (II). The approval is subject to the terms & conditions as follows:

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(i) To pay compromised payment for a total of RM7,300.00 per month for both Term Loan until full settlement of the loan ie Term Loan (I) of RM4,600.00 and Term Loan (II) for RM2700.00.

(ii) You are to adhere strictly to the repayment arrangement made, failing which the entire arrangement is to be treated as cancelled and legal action is to be reinstated and all legal cost incurred thereafter is to be borne by you.

Should the above terms and conditions are acceptable to you, kindly signify your acceptance by signing and returning the duplicate copy of this letter by 21st November 2007.

[22] But the respondents failed to pay the instalments as rescheduled. This prompted the appellants to file the action in the High Court at Johor Bahru to recover the balance owing under the loan inclusive of interest and costs. The respondents, on the other hand, filed a counterclaim to recover the sum of RM151,900 which they paid directly to the developer and the sum of RM326,738 which the respondents had repaid the appellant under the loan as well as damages, interest and costs.

ANALYSIS

[23] There were specific findings made by the learned High Court judge that must be referred to. Her Ladyship held that the LACA had been rendered void because of the order for sale that was obtained by Public Bank Bhd. That would, according to Her Ladyship, make it impossible for the appellant to reassign the property. Her Ladyship also held that although the appellant had applied to intervene in the foreclosure proceedings filed by Public Bank Berhad at the Johor Bahru High Court, there was no court order that excluded the property in question from the order for sale. In her written grounds of judgment at p 35 of the appeal record at *Jilid* 1, Her Ladyship had this to say:

32. Similarly I find in this case that the order for sale obtained by Public Bank which includes the subject property, has rendered the LACA void as it is now impossible for the plaintiff to reassign the subject property even if the full sum due is paid. The order for sale is still a valid and subsisting order and although the plaintiff applied to intervene there is no order of court excluding the subject property from the order for sale.

[24] In regard to the letters emanating from some solicitors assuring that the property had been excluded from the order for sale, the High Court judge held that these letters were not enforceable in law because the LACA was an absolute assignment to the appellant and the respondents were powerless to act to protect their interest and rights over the property. Her Ladyship further held that the LACA was frustrated and void, bearing in mind that the appellant could not perform its obligation to reassign the property upon full repayment

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of the loan taken by the respondents. In this context, this was what Her Ladyship said in her written grounds of judgment at p 36 of the appeal record at *Jilid* 1:

> 33. The letters from the various solicitors providing assurances of exemption of the subject property from sale are mere assurances and are not enforceable in law.
>
> 34. This is an absolute assignment whereby the defendants are powerless to act to protect their interest and rights over the subject property. The plaintiff has, by virtue of the LACA, been vested with absolute power to do so but appears to be content with letting the 'status quo' remain and only demonstrating an interest to recover its losses from the hapless defendants. It is inequitable and unjust to allow the plaintiff to do so in the face of the fact that the subject property has now been wrested from them by virtue of the order for sale rendering it impossible for the plaintiff to perform its obligation to reassign, pursuant to clause 37 of the LACA.
>
> 35. It is my considered view that the LACA is now frustrated and rendered void. Hence, I hold that the defendants are not under a legal obligation to pay the plaintiff the balance outstanding as claimed.

[25] After holding that the LACA had been frustrated, Her Ladyship then referred to s 66 of the Contracts Act 1950 and finally concluded at p 37 of the appeal record at *Jilid* 1 as follows:

> 37. It is my view that the plaintiff is legally bound to make restitution of the installment payments received from the defendants of RM355,409.00 (Bundle K pp. 6-9) and the sum of RM151,900.00 being part of the purchase price paid to the developer.
>
> 38. In view of the foregoing, the plaintiff's claim against the defendants is dismissed and the defendants' counter claim allowed for the sums of RM151,900.00 and RM355,409.00. Interest is not allowed. Costs, if not agreed, to be taxed.

[26] Before us, learned counsel for the appellant argued that the LACA was neither frustrated nor void. It was emphasised that the respondents had expressly given their consent to the developer to create a charge on the master title. Reference was made to cl 5.34 of the SPA which states as follows (see p 237 of the appeal record at *Jilid* 3):

> 5.34 Consent to Encumbrances
>
> The Purchaser (respondents) hereby do irrevocably consent that the Vendor (Developer) may charge or in any way encumber the said Land (master title) PROVIDED ALWAYS nothing herein shall release the Vendor (Developer) of its obligations to transfer the Premises (shoplot) free from all registrable encumbrances.

[27] That being the case, when the SPA was signed on 8 September 1996, it was agreed between the developer and the respondents that the developer could charge the master title in favour of Public Bank Bhd. Consequently, even though the respondents were not notified by the developer about the creation

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of the charge to Public Bank Bhd, cl 5.34 of the SPA showed that the respondents had consented to the creation of the charge 'or in any way encumber' the said property.

[28] Now, we have the situation where the charge, in favour of Public Bank Bhd, was created with the consent of the respondents. In the context of cl 5.34 of the SPA, if the developer fails to exclude the property from the charge and transfer the property to the respondents 'free from all registrable encumbrances', the developer would certainly breach cl 5.34. That breach entitles the respondents to institute an action against the developer for breach of contract. Read in its proper perspective, since Public Bank Bhd took foreclosure proceedings against the developer on the master title which resulted in the loss of the property, the respondents, in law, have a claim against the developer. The respondents have no basis to argue that the SPA had been frustrated. The reason for this is rather simple. The respondents cannot rely on self-induced frustration to avoid the contract.

[29] Section 57(2) of the Contracts Act 1950 enacts as follows:

> Contract to do act afterwards becoming impossible or unlawful
>
> (2) A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

[30] The word 'impossible' is not defined in the Contracts Act 1950. Section 57(2) of the Contracts Act 1950 envisages the situation where the contract becomes frustrated. Frustration puts an end to the contract. Frustration arises after the formation of the contract. The party who seeks to rely on frustration must be a party who is not at fault and no blame can be imputed to him. Lord Radcliffe in *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 (HL) sets out the test to determine frustration at p 729 of the report in these erudite terms:

> ... frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.

[31] Lord Radcliffe's popular test on frustration in *Davis Contractors Ltd v Fareham UDC* receives recognition in a number of cases subsequent thereto. Thus, it was duly applied in the following cases:

(a) *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 (HL);

(b) *Khoo Than Sui v Chan Chiau Hee* [1976] 1 MLJ 25 (HC);

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(c) *Ramli bin Zakaria & Ors v Government of Malaysia* [1982] 2 MLJ 257 (FC);

(d) *Standard Chartered Bank v Kuala Lumpur Landmark Sdn Bhd* [1991] 2 MLJ 251 (HC); and

(e) *Dato Yap Peng & Ors v Public Bank Bhd & Ors* [1997] 3 MLJ 484 (CA).

[32] Lord Simon of Glaisdale in *National Carriers Ltd v Panalpina (Northern) Ltd*, aptly said at p 700 of the report:

> I. Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance.

[33] Abdul Hamid Omar FCJ (later the Lord President of the Supreme Court) in *Ramli bin Zakaria & Ors v Government of Malaysia*, at p 262, stated the law lucidly in this way:

> In short it would appear that where after a contract has been entered into there is a change of circumstances but the changed circumstances do not render a fundamental or radical change in the obligation originally undertaken to make the performance of the contract something radically different from that originally undertaken, the contract does not become impossible and it is not discharged by frustration.

[34] The scope of s 56 of the Indian Contract Act which is equivalent to our s 57 of the Contracts Act 1950 was examined by the Indian Supreme Court in *Satyabrata Ghose v Messrs Mugneeram Bangur & Co and another* AIR 1954 SC 44. There, Mukherjea J had this to say at pp 317–318 of the report:

> The first paragraph of the section lays down the law in the same way as in England. It speaks of something which is impossible inherently or by its very nature, and no one can obviously be directed to an act. The second paragraph enunciates the law relating to discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done .... This much is clear that the word 'impossible' has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view and if an untoward event or change of circumstances totally upset the very foundation upon which the parties rested their bargain, it can very well be said that the promisor found it impossible to do the act which he promised to do.

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[35] However, it must be borne in mind that 'the doctrine of frustration is to be confined to very narrow circumstances, the reason being, I think, that commercial bargains should not be lightly avoided or brushed aside merely upon a change of circumstances' (per Abdul Malik bin Ishak JC in *Ooi Yoke In & Anor v Public Finance Bhd* [1992] MLJU 25 at p 11; [1993] 1 AMR 734 at p 742). And where the doctrine of frustration applies, the court will not grant specific performance (*Chong Wan Kum v Wan Choong* [1983] 1 CLJ 193).

[36] It is trite law that a 'self-induced frustration' does not discharge a party of his contractual obligations. In this connection, reference should be made to the following cases:

(a) *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524 (PC);

(b) *Dato Yap Peng & Ors v Public Bank Bhd & Ors*;

(c) *Lauritzen (J) AS v Wijsmuller BV, The Super Servant Two* [1990] 1 Lloyd's Rep 1 (CA);

(d) *Wilson (Paal) & Co A/S v Partenreederei Hannah Blumenthal, The Hannah Blumenthal* [1983] 1 AC 854 (HL);

(e) *HA Berney v Tronoh Mines Limited* [1949] 1 MLJ 4;

(f) *Tan Hiow v Lee Boon Chia* [1958] 3 MC 173;

(g) *Syarikat Angkasa Bumiputra v Sabah Land Development Board* [1987] 1 CLJ 90;

(h) *Ho Weng Leong v Ng Kee Chin* [1996] 5 MLJ 139; and

(i) *Cheok Hock Beng & Ors v Lim Thian Siong & Anor* [1992] 2 CLJ 1100 (HC).

[37] The doctrine of frustration does not protect a party whose own breach of the contract brings about the frustrating event. Thus, a charterer who in breach of the contract, orders a ship into the war zone, thereby causing the ship to be detained, cannot rely on the detention as a ground of frustration. It is in fact a self induced frustration (*Ocean Tramp Tankers Corpn v V/O Sovfracht, The Eugenia* [1964] 2 QB 226 (CA); and *Uni-Ocean Lines Pte Ltd v C-Trade SA, The Lucille* [1984] 1 Lloyd's Rep 244 (CA). And according to LP Thean JA in *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR 393 (CA), at p 403, the doctrine of frustration is dependent on the facts of the case. Everything boils down to the facts of the case. The present appeal is not an exception.

[38] Now, if the master title to the whole of Lot 1 complex at the JB Waterfront City is sold by Public Bank Bhd in a foreclosure proceeding and the property in question *is not excluded* from the sale, then the SPA between the

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developer and the respondents becomes impossible to perform because the developer could no longer transfer the property to the respondents 'free from all registrable encumbrances'. This impossibility is within the meaning of s 57(2) of the Contracts Act 1950 and is brought about by the respondents' own conduct when they consented to the creation of a charge by the developer on the master title under cl 5.34 of the SPA. That being the case, based on the facts unfolded, the respondents cannot now claim that the SPA has been frustrated. It is germane, at this juncture, to refer to the speech of Lord Sumner in *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435 (HL), at p 452. There, His Lordship aptly said:

> I think it is now well settled that the principle of frustration of an adventure assumes that the frustration arises without blame or fault on either side. Reliance cannot be placed on a self-induced frustration; indeed, such conduct might give the other party the option to treat the contract as repudiated.

[39] On the facts, the SPA between the developer and the respondents was not frustrated. It was submitted on behalf of the appellant that the contract did not become impossible to perform due to any supervening event. Rather, according to learned counsel for the appellant, the contract became impossible to perform because of the developer's breach in releasing the property from the charge on the master title, which was occasioned by the respondents' own act of giving consent to the developer to charge the master title or 'in any way encumber' the said property. Learned counsel for the appellant also submitted that the possibility of the developer defaulting on their loan was expected and cannot be said to be beyond the contemplation of the respondents. We agree with the submissions of learned counsel for the appellant. For the foregoing reasons, in our judgment, both the SPA and the LACA were not frustrated.

[40] The next issue to consider would be the legal effect of the LACA in the context of the present appeal. As a loan agreement, the LACA assigned absolutely all the rights, title and interest of the respondents in the SPA to the appellant. That the LACA created an equitable mortgage cannot be doubted and it is supported by the Federal Court case of *Chuah Eng Khong v Malayan Banking Bhd* [1998] 3 MLJ 97; [1999] 2 CLJ 917, where Peh Swee Chin FCJ writing for the Federal Court had this to say at pp 108–109 (MLJ); p 926 (CLJ) of the report:

> Under the said loan agreement, the borrower bought the land in question by borrowing the purchase price from the lender and assigning all the right, title and interest of the borrower in the said loan agreement to the lender. The borrower agreed to execute a charge over the said land once the document of title relating thereto was obtained or issued, the said land then being a part of a large piece of land which was under the process of subdivision into various small lots for which sub divisional documents of titles would be issued later. Transactions of the above nature, which were modelled substantially from agreements which purchasers of

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houses would make with building societies in the United Kingdom, have been in practice in this country for many many years.

At common law and under the relevant rules of equity, the said loan agreement would amount to an equitable mortgage because the assignment of the right, title and interest in the said land was expressly or obviously for the purpose of securing the loan given to the borrower to purchase the said land. The said loan agreement is not an out-and-out purchase of the said land. This view is reinforced by the promise that when the document of title of the said land was available after the completion of the subdivision aforesaid, the borrower would execute a charge in favour of the lender according to the provisions of the National Land Code (hereinafter called 'the Code').

[41] Continuing at p 109 (MLJ); p 926 (CLJ) and spilling over to p 109 (MLJ); p 927 (CLJ), His Lordship aptly said:

Thus, we have the loan, the contractual right to repay or to redeem the said land and the assignment of all 'right title and interest' in the said land pending the exercise of such contractual right to redeem. The said loan agreement therefore; at common law, will be a mortgage. It would be an equitable mortgage (and not a legal mortgage) because the borrower at the time of signing the said loan agreement had no legal estate (or registered proprietorship of a grant of land etc) but only an equitable interest as a purchaser by contract from a housing developer, pending the issuance of a separate document of title aforesaid.

[42] Finally, still continuing at p 109 (MLJ); p 927 (CLJ), His Lordship concluded as follows:

The use of the word 'mortgage' may sound like sacrilege in view of the presence of the Code which does not use the word, especially to a legal man who specialises in 'common law' but not to one who is familiar with 'Chancery practice'; for to the latter, despite the assignment, the borrower is still the owner of the said (land) subject to the mortgage.

[43] The principles of law enunciated by Peh Swee Chin FCJ in *Chuah Eng Khong v Malayan Banking Bhd* were vigorously applied by Abdul Malek bin Ahmad FCJ (later the President of the Court of Appeal) in the Federal Court case of *Phileoallied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor* [2002] 2 MLJ 513; [2002] 2 CLJ 621 (FC).

[44] To recapitulate, and by way of a summary, Peh Swee Chin FCJ in *Chuah Eng Khong v Malayan Banking Bhd* laid down the following salient principles of law:

(a) that an agreement is expressly or obviously created for the purpose of securing the loan given to the borrower to purchase the property;

(b) that the loan agreement cum assignment cannot be considered as an out-and-out purchase of the property;

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A (c) that when the individual title is issued, the borrower is expected to execute a charge pursuant to the National Land Code in favour of the lender; and

(d) that it is the borrower, and not the lender, who is the owner of the property which is subject to an equitable mortgage.

B

[45] It can be surmised from the judgment of Peh Swee Chin FCJ in *Chuah Eng Khong v Malayan Banking Bhd* that the LACA is nothing more than a security for the loan which the appellant gave to the respondents in order to assist the latter in financing the purchase of the property. EP Ellinger and Eva Lomnicka in their book entitled 'Modern Banking Law', (2nd Ed), explained the object of securities in this way:

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> In the strict sense, though, a 'security' is an interest which the debtor confers on the creditor in an item of property owned by himself or, by arrangement, in the property of some third party such as a surety. To be effective, the interest acquired by the creditor must confer on him a right to satisfy the debt out of the proceeds of the property in question ... The object of the security is, thus, to provide a source for the satisfaction of the debt covered by it. Usually, the terms of the agreement provide that the security may be realized whenever the debtor is in default. Primarily, though, it is utilized when he is insolvent. Accordingly, the main object of a security is to protect the creditor against the debtor's bankruptcy or, where the debtor is a body corporate, in the event of its liquidation. Whilst a security becomes particularly attractive if it further protects the creditor against the debtor's fraud, this does not form a major object of the arrangement.

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[46] Continuing at p 648 of the same book, the learned authors lucidly explained the difference between a mortgagor who has an equitable interest in the property, just like the present respondents, and a mortgagor who has a legal interest in the property in this way:

G

> Again a distinction has to be drawn, but this time between the mortgagor who himself only has a equitable interest in the land and the mortgagor who has a legal interest. In the former case, as noted above, the mortgagor may only create an equitable mortgage. He does so in the traditional manner of assigning his interest to the mortgagee as security, with a proviso for reassignment on redemption. In the latter case, the equitable mortgage is used where less formality than that required for legal mortgages is preferred. The equitable principle that a specifically enforceable contract gives rise to an equitable right is invoked. Thus an informal (but specifically enforceable) agreement to create a mortgage is made and this, without more, gives rise to an equitable mortgage.

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[47] Since it is now established by high authority that an assignment is no more than a mere security given by the respondents to the appellant for repayment of the loan (*Chuah Eng Khong v Malayan Banking Bhd*), the crucial question of the day that arises for determination is whether there is a total

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failure of consideration that leads to frustration when the property is lost or destroyed.

[48] Here, the respondents bought the property from the developer. The focal point of attention would be the property in question. In the event that the property is destroyed or lost not due to the fault of either party after the contract is signed and so long as the risk has not passed to the purchaser, then the SPA is said to be frustrated in accordance with the case of *Taylor and Another v Caldwell and Another* (1863) 3 B & S 826. The law is nicely put by GH Treitel in his book entitled, 'The Law of Contract' (9th Ed), at p 808 in this way:

> The doctrine of frustration applies to contracts for the sale of land, but its operation in relation to such contracts is restricted by the rule that under such a contract risk of loss passes (unless otherwise agreed) as soon as the contract is made. It follows that the contract is not frustrated if the house or buildings on the land (for the sake of which it was bought) are destroyed or seriously damaged between contract and completion.

[49] In regard to the issue of risk pertaining to the SPA of an immovable property, reference to the case of *Amalgamated Investment & Property Co Ltd v John Walker & Sons Ltd*, *Amalgamated Investment and Property Co Ltd v John Walker & Sons Ltd* [1977] 1 WLR 164 (CA), should be made. That was a case where the plaintiff agreed to buy over a warehouse from the defendant for the sum of £1.7m subject to contract. The warehouse was advertised as suitable for redevelopment and in the course of negotiations, the plaintiff had inquired of the defendant as to whether the property had been designated as a building of 'special architectural or historical interest', and the defendant replied in the negative. On 25 September 1973, a contract was signed between the parties and on the following day, the Department of Environment wrote to the defendant to inform them that the property had been selected for inclusion in the statutory list of buildings described as of 'special architectural or historical interest'. The plaintiff filed a writ and claimed that the contract should be set aside, inter alia, on the ground of frustration. Plowman VC, at first instance, rejected the argument that the plaintiff's contract had been frustrated. On appeal, Buckley LJ writing a separate judgment had this to say at p 173 of the report:

> But, in my judgment, this is a risk of a kind which every purchaser should be regarded as knowing that he is subject to when he enters into his contract of purchase. It is a risk which I think the purchaser must carry, and any loss that may result from the maturing of that risk is a loss which must lie where it falls.

[50] Lawton LJ agreed with Buckley LJ and in dismissing the appeal said in the *John Walker*'s case at p 175 as follows:

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> At common law anyone entering into a contract for the purchase of real property had to accept the risk of damage to the property after the contract had been made. Damage to the property nowadays can arise from causes other than fire and tempest. Financial loss can arise from government intervention. This is a risk which people have to suffer.

[51] In context of the present appeal, the principles of law as stated above are equally applicable in construing the contract between the parties. Thus, if a purchaser contracts to purchase from a developer a parcel within a building to be erected on a piece of land, that purchaser is placed in a situation where he faces several foreseeable risks. The foremost would be the possibility that the construction may be abandoned due to the insolvency of the developer. Yet another known and foreseeable risk is the fact that the master title will be charged by the developer to a banking institution for a bridging loan. Consequently, the purchaser runs the risk that his right over his parcel may be subject to the registered charge on the master title. In the event that the developer defaults and fails to pay the chargee, the entire land will be sold in a foreclosure proceeding and to borrow the words of Buckley LJ in the *John Walker*'s case, 'this is a risk of a kind which every purchaser should be regarded as knowing that he is subject to when he enters into his contract of purchase'.

[52] Now, when the respondents gave their consent to the developer to charge the master title to Public Bank Berhad, the risk that the said bank may foreclose the land and their property was a risk which the respondents shouldered, and to borrow the words of Buckley LJ in the *John Walker*'s case, 'any loss that may result from the maturing of that risk is a loss which must lie where it falls'. And the fact that the respondents expressly consented to the developer charging the master title to the said bank meant that the respondents were willing to shoulder the risk of foreclosure on the master title in the event that the developer defaulted in paying the loan and the potential loss of the property arising from the foreclosure. In our judgment, this result is within the reasonable contemplation of the respondents in consenting to the creation of the charge pursuant to cl 5.34 of the SPA.

[53] In our judgment, the aforesaid risk did not pass to the appellant under the LACA. It must be emphasised that the LACA is a loan agreement. It is in the nature of a contract between the appellant and the respondents where the appellant agreed to grant to the respondents a loan in exchange for the repayment of that loan with interest. It is as simple as that. It cannot be denied that the purpose of the loan is to partially finance the purchase of the property. But this does not change the fact that the nub of the loan was nothing more than an advance of money by the appellant to the respondents in consideration of its repayment coupled with interest. The root of the loan transaction is not the property itself because the property merely serves as a security for the

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repayment of the loan. Seen in this context, the LACA cannot be frustrated even if the SPA with the developer is frustrated, which is not the case here. It must be reiterated that the LACA stands independently from the SPA. In our judgment, the performance of the obligations under the LACA does not become impossible even if the SPA between the developer and the respondents is frustrated.

[54] By way of an illustration, let us consider the situation where the appellant had given the loan to the respondents without requiring any security for the loan. And the rest of the facts remain unchanged in that the developer charged the master title to Public Bank Bhd and the property was sold at a public auction. Would the foreclosure on the master title be the reason to declare that the loan agreement between the appellant and the respondents be held to be void on the ground of frustration? The answer would be in the negative because the property is not connected in any way to the loan transaction. Would it make any difference if the property had been taken as a security? Bearing in mind that the property is used only as security for the re payment of the loan, then in the event that the security is lost due to no fault of the appellant, why should the appellant lose the right to recover the loan? Why must the loan contract between the appellant and the respondents be deemed frustrated? Would the appellant's position be better off if it did not take the assignment? With due respect, that would simply be absurd.

[55] In a transaction of this kind, only the benefit of the SPA will be assigned to the banker as security for the repayment of the loan. The obligations and risks under the SPA remain with the purchaser or, like this case, only with the respondents. This is expressly provided for in cl 7 of the LACA which reads as follows (see p 130 of the appeal record at *Jilid* 2):

> 7. ASSIGNMENT
>
> For the consideration aforesaid the Assignor hereby ABSOLUTELY ASSIGNS to the Bank the Said Property and the full and entire benefit of the Sale Agreement together with all rights title and interest of the Assignor therein. PROVIDED ALWAYS that notwithstanding the assignment hereinbefore contained or any other provisions of this Agreement the Assignor shall and hereby undertakes to continue to observe perform and be bound by all whatsoever conditions covenants and stipulations therein on the part of the Assignor expressed and contained in the Sale Agreement.

[56] According to the Federal Court case of *Chuah Eng Khong v Malayan Banking Bhd*, there is no out-and-out purchase in an assignment of this nature and that the usual rule in law that the risk of the property passes upon execution of the SPA does not apply to the LACA. It must be borne in mind that the LACA is not a sale agreement for the property and that being the case, the risk in the property never passed to the appellant. This approach is reflected in cl 7

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of the LACA which clearly stipulates that the respondents shall continue to be liable under the SPA with the developer.

[57] It is our judgment that even if the property was lost or destroyed, that fact does not and cannot frustrate the LACA. With respect, the learned High Court judge erred in law when her Ladyship held that the LACA was frustrated because of the foreclosure proceedings on the master title. Her Ladyship failed to consider the settled legal position pertaining to the nature and effect of the LACA transactions together with the rights, liabilities and risks of the various parties in transactions of this nature.

[58] Learned counsel for the respondents made reference to the case of *Arab Malaysian Bank Bhd v Strategi Cerah Sdn Bhd & Ors* [2006] 6 MLJ 339; [2006] 3 CLJ 742, a decision of another High Court, which was relied by the learned High Court judge and argued that at the time when the property was assigned by the respondents to the appellant, the property was not charged by the developer to Public Bank Bhd as yet and, consequently, it was not subject to any order for sale. Learned counsel for the respondents further argued that since the order for sale dated 7 October 2003 is still valid and binding, and the learned High Court judge found that the property is caught in the order for sale and is not excluded, the property would be sold by public auction to repay the debts due and owing to Public Bank Bhd. That being the case, so it was argued, that whatever assignment executed by the appellant would be rendered meaningless and of no value whatsoever.

[59] It was further argued by learned counsel for the respondents that the property will be sold by public auction to repay the developer's debts of more than RM16m as at 7 October 2003 to Public Bank Bhd and, consequently, any reassignment executed by the appellant will only be in form and of no substance whatsoever.

[60] Now, the learned High Court judge relied heavily on the case of *Strategi Cerah Sdn Bhd*, in arriving at the decision that the LACA had been frustrated. The facts in that case may briefly be stated as follows. It concerned a loan agreement cum assignment in favour of Arab Malaysian Bank Bhd as security for a term loan. That assignment was in respect of a condominium which the borrower purchased from a developer. However, the developer later sold the condominium to a third party. When Arab Malaysian Bank Bhd sued the borrower to recover the term loan, the borrower counterclaimed and argued that the loan contract had been frustrated due to a total failure of consideration. At p 346 (MLJ); p 750 (CLJ) of the report, the High Court had this to say:

> (19) It is clear that the assignment agreement and term loan dated 11 March 1997 were frustrated. The fact that the defendants could never get back the units that they have assigned to the plaintiff is the main cause. This state of affairs came about

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> because the developer had sold off the unit to a third party. The fact that the plaintiff's application in Civil Suit No S3-24–3280 of 2002 for a declaration that it is the rightful assignee of the property was dismissed had confirmed the fate of the units. They could never be handed over to the defendants. Even if the defendants had paid up the entire loan disbursed to them they will never be able to enjoy the units that they have paid for over the years.
>
> (20) I find that the plaintiff's argument that the defendants would have to keep making payments to the plaintiff regardless of the fact they will never obtain the units somewhat inconceivable. Equally so is the plaintiff's contention that the units are not the consideration for the agreement, but the defendants' agreement to pay. I can see the answer all within the provisions of cl 50 of the agreement. The clause provides that the defendants shall be entitled to obtain a discharge and release of the said property upon full repayment of the loan to the plaintiff. This shows that what is required of the plaintiff after the loan is repaid in full is to release and discharge the property to the defendants. This is the plaintiff's obligation. It is obvious that at the end of the day, the plaintiff would not be able to fulfill that obligation under cl 50 of the agreement. The effect of all this is that the whole contract is frustrated as a fundamental term of the contract for the plaintiff to reassign the condominium has become impossible even if the full sum due is paid.

[61] Clause 50 of the agreement which the High Court referred to in the above mentioned passage was reproduced at p 344 (MLJ); p 748 (CLJ) of the report and it was worded as follows:

> 50. Release
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> ... Upon repayment to the Bank of the loan together with all interest thereon and all other whatsoever monies payable by the Borrower under this Agreement, the Borrower shall be entitled at the Borrower's own cost and expense ... To obtain discharge and release of the said property from the bank ...

[62] In *Strategi Cerah Sdn Bhd*, the High Court ruled that the loan agreement cum assignment was frustrated because the fundamental term for the bank 'to reassign the condominium has become impossible even if the full sum due is paid'. With respect, this conclusion is erroneous. The correct legal position may be stated as follows. When a property is reassigned to a borrower, it means that the bank executes a document relinquishing its security over the property. It cannot be equated with an obligation on the part of the bank to deliver title or possession of the property to the borrower. It is the developer who is obliged to deliver the property to the borrower after construction of the property and issuance of the strata/individual title. In the present appeal, this fact is borne out in cl 6.3 of the SPA which reads as follows (see pp 239–240 of the appeal record at *Jilid* 3):

> 6.3 Transfer of Title To Purchaser
>
> PROVIDED that the purchaser shall have paid to the Vendor the full purchase price and all other moneys (if any) payable hereunder and shall have duly observed and performed the various terms, conditions and stipulations herein to be observed and

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> performed by him/her, the Vendor shall within sixty (60) days either of the date of such payment as aforesaid or of the date of the issue of the relevant separate subsidiary/strata title (whichever shall be the later) execute a valid and registrable but unstamped Transfer of the same in favour of the purchaser of the purchaser's nominee or nominees. Provided that prior to the transfer herein mentioned, the Vendor shall have the right to charge or mortgage the said Land and the Complex (with the exclusion of the Premises) to a Financial Institution on such conditions as the Vendor and the Financial Institution may in their absolute discretion agree upon.

[63] Under the SPA, it is the developer who is obliged to deliver the title to the purchaser and that responsibility cannot be passed to the banker.

[64] The High Court in *Strategi Cerah Sdn Bhd*, found it difficult to accept the fact that the borrowers who have paid the loan and interest to the bank would end up losing the property. The High Court felt that this situation was not fair to the borrower. While we acknowledge that the situation was unfair to the borrower, we cannot hold the bank responsible for the loss in such cases. To do so would be equally unfair to the bank. The party who must be held responsible in such cases would be the developer. Although it is tempting to hold the bank to be responsible for the loss in such cases based on the common belief that banks have deep pockets and are financially strong, yet both law and policy dictate against pinning the loss to the banks.

[65] If the courts were to hold that the developers' obligations under a sale and purchase agreement are to be shouldered by the bankers, banks will refuse to finance property where there is no strata/individual title issued. Why should the bank finance property under construction if the bank is to be held liable for breaches by the developer such as insolvency resulting in the abandonment of the project or foreclosure proceeding undertaken by the registered chargee in respect of the master title? In such a situation, banks would simply take the stand that financing would only be made available where there is title that can be transferred to the borrower and the charge registered in favour of the bank. If the banks start to do this, the economy would collapse. The whole construction industry in the country will be in turmoil. Developers will have to complete construction and secure the issuance of the strata/individual title before they can sell the units without financing from banks. The bulk of the purchasers would not be able to purchase these units. In this regard, the views expressed by the Federal Court in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77; [1997] 2 CLJ 36, are germane to the occasion at hand. At p 88 (MLJ); p 50 (CLJ), this was what the Federal Court said:

> Financial institutions would then become reluctant to lend money to bona fide entrepreneurs. Commerce would come to a standstill and the development of land

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> and industries in this country which are largely dependent upon loans from banks would cease. No judgment of this court will be designed to produce such a consequence.

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[66] If banks are to be held liable by the court for the defaults of developers under the sale and purchase agreements where the banks are not a party to, such decision by the court would give rise to the unhappy situation the Federal Court has alluded to in *Low Lee Lian*'s case. It is for this reason that the decision of *Strategi Cerah Sdn Bhd*, goes off tangent and is inconsistent with the judgment of the Federal Court in *Chuah Eng Khong v Malayan Banking Bhd*. In our judgment, *Strategi Cerah Sdn Bhd* was wrongly decided. The High Court in *Strategi Cerah Sdn Bhd* was patently wrong when it held that the main purpose of the loan agreement was 'obviously to finance the purchase of the units by the defendants' and that 'the consideration for the agreement is therefore the assigned units'. With due respect, it is obvious that a banker gives a loan in consideration of its repayment with interest. And the purpose for which the borrower takes the loan is not the consideration for the loan transaction. To hold otherwise would be absurd as it runs counter to law and commerce.

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[67] Next, we will consider the issue of whether the release of the security was and still is legally possible. For starters, we have this to say. That the crux of the judgment of the learned High Court judge centred on the point that the LACA had been frustrated because it was impossible for the appellant to perform its obligation to reassign the property pursuant to cl 37 of the LACA. With respect, this finding is wrong in law.

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[68] Clause 37 of the LACA reads as follows (see p 150 of the appeal record at *Jilid* 2):

> 37. RELEASE
>
> Upon repayment to the bank of the Banking Facilities together with all interest thereon and all other whatsoever monies payable by the Assignor under this Agreement the Assignor shall be entitled at his entire cost and expense to obtain a discharge and release of the Said Property from the Bank such discharge and release to be in such form as the Bank shall in the circumstances consider appropriate provided that such discharge and release shall be prepared by the solicitors appointed by the Bank and duly executed by the Bank at the cost and expense of the Assignor.

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[69] We must highlight the following facts. That at the time the assignment was created, the property did not exist. The property was not constructed as yet. What was in existence was the SPA between the developer and the respondents. The assignment of the property was only in regard to the assignment of all the respondents' rights, title and interest in the SPA to the appellant. This is clearly reflected in cl 7 of the LACA which stipulates that the

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'Assignor hereby absolutely assigns to the Bank the said Property and the full and entire benefit of the Sale Agreement together with all rights, title and interest of the Assignor therein'.

[70] The High Court case of *Hong Leong Bank Bhd v Goh Sin Khai* [2005] 3 MLJ 154; [2005] 3 CLJ 24 explained the legal effect of the deed of assignment in these trenchant terms (see pp 170–171 (MLJ); p 37 (CLJ) of the report):

> The deed of assignment in this case states that the defendant assigns 'the full and entire benefit of the sale and purchase agreement together with all rights, title and interests of the assignor(s) therein'. The sale and purchase spoken of in the assignment is the sale and purchase contract between the developer and the assignor for the purchase of the property. Now, it is evident in these transactions that the assignor has paid the full purchase price for the property to the developer utilising the funds made available to him by the assignee. It is clear from Lian Keow that the developer is no more than a constructive trustee in this case, but he still holds the legal title to the property until it is transferred. Until that transfer takes place, the assignor only has a right in personam, that is the contractual right or benefit accuring to him under the sale and purchase agreement. That is a right enforceable by action if unlawfully withheld by the developer and is a chose in action. Following from this, the absolute assignment in these cases amounts to a transfer of the legal right of the chose in action from the purchaser to the financier.

[71] Another High Court case of *Hong Leong Bank Bhd (which has taken over all assets and liabilities of Hong Leong Finance Bhd) v Sum-Projects (Bros) Sdn Bhd* [2010] 7 MLJ 39; [2010] 7 CLJ 1010 added mileage and further reinforced and explained the legal ramifications of the deed of assignment at pp 51–52 (MLJ); pp 1021–1022 (CLJ) of the report:

> (18) ... The plaintiff's claim is predicated on its rights as an assignee under the deed of assignment. The defendant's contention is that the plaintiff lacks locus standi as it has assigned its rights title and interest to the successful bidder. What is the nature of the plaintiff's rights? The plaintiff holds an absolute assignment; this is consistent with s 7:01 of the deed of assignment where the words 'absolutely assign(s) to the lender' is employed (*Nouvac Mont Dor (M) Sdn Bhd*; *United General Insurance Co Sdn Bhd*; *Hipparion (M) Sdn Bhd*; *Phileoallied Bank (M) Bhd*). As an absolute assignee the plaintiff is vested with certain rights under s 4(3) of the Civil Law 1956 which reads:
>
> > Any absolute assignment, by writing, under the hand of the assignor, not purporting to be way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same,

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and the power to give a good discharge for the same, without the concurrence of the assignor.

(19) As the SPA does not create any debt payable by the defendant to the purchasers, there is no assignment of any debt; accordingly, the defendant is not a debtor within the meaning of s 4(3). Instead, the SPA is a chose in action. A chose in action is defined as 'a thing of which a person who has not the present enjoyment, but merely a right to recover it (if withheld) by action' (*Mozley & Whiteley's Law Dictionary*, (10th Ed). In this case the defendant has an obligation to complete and deliver the property purchased. In this regard, the right to recover the property from the defendant, if withheld, is a chose in action. It is this right which has been assigned to the plaintiff under the deed of assignment.

[72] The High Court cases of *Hong Leong Bank Bhd v Goh Sin Khai* and *Hong Leong Bank Bhd (which has taken over all assets and liabilities of Hong Leong Finance Bhd) v Sum-Projects (Bros) Sdn Bhd* are consistent with the Federal Court case of *Chuah Eng Khong v Malayan Banking Bhd* in that there is no out-and-out purchase of the property by the financier pursuant to the assignment. The assignment merely transfers the chose in action to the banker. And once the loan has been fully repaid, that chose in action is capable of being retransferred or reassigned to the borrower.

[73] For these varied reasons, the learned High Court judge erred in holding that the appellant could no longer satisfy the requirements of cl 37 of the LACA in order to release the security. Learned counsel for the appellant submitted that the appellant was always, and still is, capable of reassigning the chose in action that had been assigned to it, back to the respondents. When the learned High Court judge equated the chose in action with physical property, Her Ladyship gravely erred. In reality, what was assigned was the rights under the SPA with the developer.

[74] Next, we will consider whether the property was lost. We reiterate that the appellant cannot be held liable in law if the property was lost. However, based on the evidence relied upon by the learned High Court judge, the property was, in fact, not lost. In her grounds of judgment, Her Ladyship had this to say at pp 28–30 of the appeal record at *Jilid* 1:

14. PW1 insisted that the subject property was not lost as both Public Bank and the liquidators of Transbay had confirmed the subject property was excluded from the sale tender exercise that was subsequently carried out.

15. Under cross-examination, PW1 admitted that the order for sale of the High Court dated 7 October 2005 included the subject property. She did not agree that by virtue of this fact, the plaintiff had lost its interest and rights to the subject property to Public Bank. Upon further cross, she conceded that if the defendants were to fully pay up the facility now, the plaintiff would not

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be able to reassign the subject property back to the defendants together with all the rights and interest to the property (see Q & A 19/p 11 of the Notes of Evidence).

16. She was further crossed on the court's direction dated 14 August 2008 where she had said, inter alia, in her witness statement (at Q & A 10) that the High Court judge had directed that Public Bank be allowed to proceed to sell the undisputed units leaving out the disputed units by other previous purchasers. When it was pointed out to her that the court's minutes did not contain any such direction, she admitted to this fact and conceded that it was the liquidators who were so directed by the court, not Public Bank.

17. For ease of reference, the court's direction dated 14 August 2008 is set out below:

> Court:
>
> To save time and cost in the main the cost of having the parties to travel down here from Johor Bahru, it is appropriate that the following prospective order be made:
>
> The liquidators shall release their claim on the units purchased by the interveners on condition only if the relevant authority approves the sale to the undisclosed purchaser and the liquidators receiving the purchase price from the undisclosed purchaser and the plaintiff be paid all the outstanding sums payable to the plaintiff in respect of the charge.
>
> In the event that the conditions are not achieved within a reasonable time this application shall be reinstated and be fixed for hearing.
>
> Parties are at liberty to apply. Parties will write to the court to confirm the completion of sale.

[75] Continuing further at p 30 of the appeal record at *Jilid* 1, the learned High Court judge in her grounds of judgment had this to say:

18. PW1 also conceded that up until the day of trial, some three years after the court's direction, the conditions laid down by the learned judge on 14 August 2008 had still not been satisfied by the liquidators and that the order for sale by Public Bank, which included the subject property, is still valid.

[76] At p 35 of the appeal record at *Jilid* 1, the learned High Court judge in her grounds of judgment, which was reproduced earlier in this judgment, alluded to the order for sale obtained by Public Bank Bhd which included the property in question and which has rendered the LACA void. Her Ladyship held that it was now impossible for the appellant to reassign the property even

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if the full sum due is paid. According to Her Ladyship, the order for sale is still valid and subsisting and although the appellant had applied to intervene, there was no order excluding the property from the order for sale. But, with respect, the finding that the property is lost because the order for sale obtained by Public Bank Bhd still subsists is inconsistent with the order made by Justice Kang Hwee Gee dated 14 August 2008. It must be recalled that the order by Justice Kang Hwee Gee dated 14 August 2008 was for the liquidators to obtain approval from the regulatory authorities for the sale of the entire development to new purchasers. And that the proceeds of the sale were to be used to pay off the amount owing to Public Bank Bhd under the charge and secure the release of the respondents' property. And if these conditions were not met, then the application to intervene and set aside the order for sale will be reinstated and fixed for hearing.

[77] It is crystal clear that the High Court had not made any decision on the application to intervene and set aside the order for sale. Although the order for sale may still be subsisting, it is apparent that the directions of Justice Kang Hwee Gee showed that the order was kept in abeyance pending the disposal of the development by the liquidator to a third party. With this background scenario, it was certainly premature to conclude that the property was lost. At this juncture, reference to the High Court case of *Malayan Banking Bhd v Tonyin Fast Foods Sdn Bhd and Others* [2010] MLJU 564 should be made. That was a case where the defendants claimed that the bank had lost the security due to the order for sale obtained by Public Bank Bhd. This was what the High Court said:

> (2) Whether the plaintiff has lost its security by reason of the fact that the shop unit was not excluded in the foreclosure proceedings commenced by Public Bank Bhd under OS 24–493 of 2003?
>
> Findings of the Court
>
> Apart from the fact that an order for sale was made on 7 October 2003 there is no evidence to indicate that the Shop Unit was sold pursuant to the order for sale. However, irrespective of whether the shop unit has been sold the plaintiff may still exercise its contractual rights under the assignment and power of attorney to sell the shop unit to realise the security. If the plaintiff exercises that right, what remains to be determined is whether the plaintiff's rights to the shop unit under the assignment takes priority over PBB's rights under the order for sale; that question is not for adjudication before this court. For the foregoing reasons the question is answered in the negative.

[78] In *Malayan Banking Bhd v Tonyin Fast Foos Sdn Bhd and Others*, the High Court rightly emphasised that the question of priorities between the assignment and the registered charge is a matter that has to be determined by the court. And until the court makes a decision that the charge takes priority over the assignment, there is no basis to conclude that the property was lost. It

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A is in this context that the learned High Court judge, in the present appeal before us, erred when Her Ladyship held otherwise.

[79] To recapitulate, we have this to say:

B (a) as a loan agreement cum assignment, the LACA is a vehicle for the respondents to secure the loan to purchase the property;

(b) that the LACA is not an out-and-out purchase of the property by the appellant;

C (c) that the respondents are the owners of the property and that property is subject to an equitable mortgage in favour of the appellant;

(d) as owners of the property, the respondents bear all risks in connection with the property;

D (e) since the respondents confer onto the appellant a security interest in the property, the appellant is entitled to recoup the loan in the event of a default from the proceeds of the sale of the security;

(f) the main purpose of the security is to protect the appellant;

E (g) the respondents are barred from relying on self induced frustration because they allowed the developer to charge the master title pursuant to cl 5.34 of the SPA;

(h) the release and discharge of the security upon repayment of the loan
F cannot be equated with the delivery of title or possession of the property to the respondents;

(i) it is the appellant who is obliged to release the security upon repayment of the loan while the obligation to deliver the title rests with the developer under a separate contract with the respondents which the
G appellant is not privy to; and

(j) if the appellant is held liable for the loss of the property, it will bring about dire consquences in that future financing of properties without title would come to an end since bankers would not be inclined to
H assume such unwarranted risk.

[80] A final point to be considered would relate to the issue of s 15 of the Civil Law Act 1956 which was overlooked by the learned High Court judge. Her Ladyship committed a serious error of law when she applied s 66 of the
I Contracts Act 1950 in isolation without reading it together with ss 15 of the Civil Law Act 1956. While s 66 of the Contracts Act 1950 spells out the general consequences when a contract is said to be void, the consequences of frustration of a contract as set out under s 15 of the Civil Law Act 1956 cannot be ignored. In *Lin Wen-Chih & Anor v Pacific Forest Industries Sdn Bhd (formerly*

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known as Veramax Sdn Bhd) & Anor [2008] 6 MLJ 89; [2008] 5 CLJ 29 (CA), James Foong JCA (later FCJ), aptly said at p 96 (MLJ); p 38 (CLJ) that, 'When the agreement is discharged by frustration, then s 15 of the Civil Law Act 1956 applies'.

[81] Section 15(1) of the Civil Law Act 1956 enacts as follows:

> Where a contract has become impossible of performance or been otherwise frustrated, and the parties thereto have for that reason been discharged from the further performance of the contract, subsection (2) to (6) shall, subject to section 16, have effect in relation thereto.

[82] Thus, it is clear from s 15(1) of the Civil Law Act 1956 that when a contract is frustrated, then sub-ss (2) to (6) shall come into play. It must be recalled that while the learned High Court judge found that the LACA had been frustrated, Her Ladyship did not find that the sale and purchase agreement between the developer and the respondents had been frustrated.

[83] Proceeding ahead, we must now reproduce s 15(2) of the Civil Law Act 1956. It is worded as follows:

> (2) All sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged (in this Act referred to as 'the time of discharge') shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be so payable:
>
> Provided that, if the party to whom the sums were so paid or payable incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the Court may, if it considers it just to do so having regard to all the circumstances of the case, allow him to retain or, as the case may be, recover the whole or any part of the sums so paid or payable, not being an amount in excess of the expenses so incurred.

[84] Sub-section (2) of s 15 of the Civil Law Act 1956 in clear language states as follows:

(a) that prior to frustration, all sums paid by one party to the other shall be recoverable from that party;

(b) that prior to frustration, the sums that are to be paid by one party to the other need no longer be paid; and

(c) that prior to frustration, when a party to whom money has been paid and has incurred expenses for the purpose of the performance of the contract, the court may allow that party to retain or recover the whole or any part of the sums so paid.

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[85] At this juncture, it is appropriate to set out the orders of the learned High Court judge.

[86] The first order made by the learned High Court judge was when Her Ladyship ordered the appellant to refund the sum of RM151,900 being part of the purchase price paid by the respondents to the developer. With due respect, there was no basis whatsoever for the learned High Court judge to make this order. The sale and purchase agreement between the respondents and the developer was a separate contract and the respondents paid the sum of RM151,900 to the developer directly under that contract. Her Ladyship did not make any finding that this contract had been frustrated and even if she did, under s 15(2) of the Civil Law Act 1956, it is the developer and not the appellant that would be liable to refund the sum of RM151,900 to the respondents. And since this sum was never paid by the respondents to the appellant under the LACA (it must be recalled that her Ladyship held that the LACA had been frustrated), the respondents were not entitled under s 15(2) of the Civil Law Act 1956 to recover that sum. It is thus crystal clear that the learned High Court judge erred in law when Her Ladyship ordered the appellant to refund the sum of RM151,900 to the respondents. Consequently, in our judgment, the first order of Her Ladyship must be set aside.

[87] The second order made by the learned High Court judge pertained to the order that the appellant refund to the respondents the sum of RM355,409 being the instalments paid by the respondents to the appellant under the LACA. It must be recalled that under the LACA, the appellant had granted the term loans to the respondents to enable them to pay for the purchase of the shop unit which they bought from the developer. The LACA stipulated that the appellant must disburse the term loans to the developer. In fact, this was the expense which the appellant incurred in the performance of the LACA prior to frustration. The total sum which the appellant disbursed to the developer was RM450,000 and this was the total expense which the appellant incurred in the performance of the LACA prior to frustration.

[88] It is quite apparent that the learned High Court judge ignored the provisions of s 15 of the Civil Law Act 1956 when she made the aforesaid orders. For these reasons, inter alia, the appeal should be allowed.

[89] For these varied reasons, we unanimously allowed the appeal with costs of RM50,000 here and below. We set aside the order of the High Court at Johor Bahru and we made an order that the respondents return to the appellant the sum of RM507,309 paid by the appellant to the respondents pursuant to the order of the High Court. We also allowed the appellant's claim as reflected in paras 9(a) to 9(d) of the statement of claim at pp 44–45 of the appeal record at *Jilid* 1. Deposit to be refunded to the appellant.

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Appeal and claim allowed with costs RM50,000.

Reported by Ashok Kumar